VIRGINIA LAW REGISTER

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We republish in this month's issue an article from the *Watchman,* one of the organs of the Baptist denomination, which we commend to the profession. Whilst much that it says as to the courts and court procedure is couched in rather strong language, can the profession say that the language is too strong? One fact is well known—litigation is steadily falling off. The law docket of most of our circuit courts has become almost a farce, and as was said by a prominent lawyer in one of the largest and wealthiest counties in this commonwealth, "lawyers would have to go to some other business to make a living, if they depended upon the common-law docket of most of the courts for their support. It may be said that this fact appeals to the lower instinct—that of gain, and that it is a wholesome sign of a healthy body politic when men no longer litigate. We do not think so. It is a sign that business men distrust the law procedure and only appeal to it as a *dernier resort.*

Decline of Litigation.

That the fault lies entirely with the profession the writer does not believe. Much of it is due to unwise litigation, favoring the debtor and the criminal class alike; to the illiberal allowances of costs as made by our legislative bodies, and to our jury system—or rather our lack of system in the selection of good juries. Lawyers as well as clients begin to look with apprehension upon the submission of any case involving a large amount of money to juries selected as juries are now selected. In Virginia, as has been well set out by Judge Phlegar in his address to the Virginia Bar Association at the Hot Springs in August, and by Mr. Guy in his brief and able article in the October number of the REGISTER, the jury system in Virginia, with its numerous exemptions and its method of selection, is probably one of the worst in the country. Is it not time that the lawyers in this commonwealth should awake to their duty to their clients, their state and

themselves, and actively agitate for the abolition of all exemptions to jury service, and to bring pressure to bear upon our legislative body to provide some system by which we could be assured that the juries when placed in the box should represent the highest type of the citizens of our commonwealth.

Nor, are the courts entirely without fault. There is an easy-going way of indulging tardy jurymen and tardy witnesses in all of our courts; of granting continuances on account of absence of witnesses, and allowing those witnesses to go unpunished for their delay, absence and contempt of the court's process. It might go hard at first, but if judges would fine heavily tardy and delinquent jurymen—fine as heavily tardy and nonappearing witnesses; hold the bar up to prompt readiness in the preparation and trial of causes, and speed the trials when at the bar, the result would in the end prove not only to the benefit of the bar and of litigants, but of every one interested in the expedition of justice.

Our judges are able and impartial, but a little too kind-hearted; our bar not unwilling to procrastinate and shirk hard work. Do we not—all of us—stand in our own light and should not every energy of both the courts and the bar be put forth to assure prompt obedience to the court's process—first-class juries, quick trials and speedy termination of litigation—in all cases?

Work of the Supreme Court.

That our Supreme Court of Appeals works, to use a homely phrase, "with its neck to the collar," is evidenced by the work done at the September term of the court in Staunton, which closed on the 26th inst. During that term of the court out of the forty-six cases upon the docket, thirty-three were heard to final judgment, nine were removed to Richmond and placed upon the privileged docket, and four cases were continued. Considering the oppressive September weather and the twenty-four working days which the court had, the work accomplished speaks very highly for the diligence and zeal of our appellate tribunal.

An inspection of volume 104 of *Virginia Reports* furnishes some food for thought as to the character of the litigation which reaches the higher courts from the *nisi prius* courts in the state.

Volume 104 of Virginia Reports.

One hundred and fifteen cases are reported. Out of these, fifty-six are affirmed, one amended and affirmed, and fifty-eight reversed. Twenty-six of the cases reported involve questions of damages to life and person; seven, of damages to property; one for libel and one for malicious prosecution; so that about one-third of the cases reported are upon actions sounding in tort. Seven of the cases were insurance cases—one of accident, three of fire and four of life. Six criminal cases were reported. Five of the cases turn upon questions of taxation. In three, decisions are rendered involving the law of Trustees; in three, the law of Vendor and Purchaser; in three, questions of Water and Watercourses; and in three, questions relating to Wills. Eleven cases discuss Pleading; twelve, questions of Appeal and Error. Constitutional Law is discussed in five, and the Law of Contracts in six. The Law of Corporations is also discussed in six cases; whilst Eminent Domain, Guardian and Ward, Negotiable Instruments, Parent and Child, Partition, Res Adjudicata, and Sales have one case each to their credit. Injunction has two, though one case—Campbell *v.* Bryant—is not indexed under this head, as we think it should have been, and not merely a cross reference given. Questions of Evidence are discussed in sixteen cases; Instructions, in thirteen; Master and Servant, in eleven; Negligence, in nine. Only two cases are reported in regard to the laws concerning Married Women, and the questions relating to the more prosaic Partnership in business matters, are discussed in two cases. Three cases are reported upon Specific Performance; four cases, upon the Construction of Statutes; and three are Actions of Ejectment.

Professor Burks' work is of course well done. We have noticed one slip. Another is in not indexing the case of West *v.* Newport News under the head of Taxation, although it is thoroughly indexed under the head of Banks and Banking. The table of cases explained, criticized or overruled from 91 to 104 Va., inclusive, is of much value.

Of the one hundred and fifteen cases, fifty-five were common-

law cases. Of these cases thirty-one out of the fifty-five were reversed, twenty-four being sustained. Of the six criminal cases, four were reversed and two affirmed. The large number of reversals,—fifty-eight—being more than half of the cases which went up, might well give cause for serious reflection as to whether our lower courts are measuring up to the full standard. In the common-law cases many of the reversals were due to errors in instructions. It seems a great pity that there should not arise some lawgiver or lawmaker who could devise some means to change the illogical and confusing method by which juries are now instructed as to the law in cases, submitted to them. We hope to allude to this in some later issue.

We are glad to note that in the case of the Chesapeake & Ohio Railway Company *v.* Stock, the court has disapproved the *Scintilla Doctrine.* This, at least, is one step in the right direction. Judge Keith's opinion in this case upon the question of instructions is clear and concise. The defendant's "prayer" to the lower court is almost pathetic as well as novel, but that court declined to be a "special Providence," and the Supreme Court approved its action.

It affords us much pleasure to note that there were only four cases in which any judge dissented. In the case of the Western Union Telegraph Co. *v.* Hughes, Judge Cardwell delivered a dissenting opinion, Judge Keith concurring. In the case of the Standard Oil Co. *v.* Commonwealth, Judge Keith delivered a dissenting opinion, Judge Cardwell concurring; and in the case of the Chesapeake & Ohio Railway Co. *v.* Beasley, both Judge Buchanan and Judge Harrison delivered dissenting opinions; and in Cremean's case Judge Cardwell delivered a strong and able dissenting opinion. As opinions in criminal cases involving questions of continuance ought not to be taken by the lower courts as absolutely binding precedents, we trust that these lower courts, when questions of a similar character arise, will carefully consider the dissenting opinion in this case.